THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CONSOLIDATED CIVIL APPEALS NOS. 0266 AND 0297 OF 2017

1. NAKIVUBO ROAD OLD KAMPALA
(KISEKKA) MARKET VENDORS LTD
2. KISEMBO ROBERT KASORO
3. HAJJI NSIMBI YUSUF::::::::::::::::::::::::::::::::::::APPELLANTS
4. UGANDA REGISTRATION SERVICES BUREAU
5. THE REGISTRAR OF COMPANIES
6. THE REGISTRAR OF DOCUMENTS

VERSUS

1. KAYITA GEOFFREY
2. RWAKIJUMA PETER
3. KIBONEKA SAMSON
4. SWAIB ZIZINGA::RESPONDENTS

(Appeals from the decision of the High Court of Uganda at Kampala (Civil Division) before Mugambe, J. dated 12th September, 2017 in Miscellaneous Cause No. 109 of 2015)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE STEPHEN MUSOTA, JA
HON. MR. JUSTICE MUZAMIRU MUTANGULA KIBEEDI, JA

JUDGMENT OF THE COURT

Introduction

The 1st, 2nd and 3rd appellants filed civil appeal no. 266 of 2017 appealing against the whole of the decision of the High Court of Uganda at Kampala by the Hon. Justice Lydia Mugambe dated 18th August 2017 vide Misc. Cause no. 109 of 2015 and the decision in consolidated Miscellaneous application

no. 894 of 2017 & 139 of 2018 dated 27th September 2019. The 4th, 5th and 6th appellants also filed Civil Appeal no. 297 of 2017 arising from the decision of the High court in Misc. Cause no. 109 of 2015. The appeals were consolidated by this court.

Background

The background to these appeals as per the appellant's facts laid out in their submissions filed in this court on 28th June 2022 is that 1st Appellant was incorporated on 24th August 2007 as a company limited by guarantee without a share capital with a membership of about 2000 members. The 2nd and 3rd appellants were duly voted by the general assembly as some of the members of the Board of Directors.

The Board led by the 2nd appellant then entered into a construction contract with M/S ROKO Construction Ltd on 9th March 2015 for construction of a Four Block project on the land, of which to date, the first block is completed and occupied, and the 2nd Block is near completion.

Sometime around 7th February 2015, some people who included the respondents convened a meeting as "members" of the company and resolved to appoint a new Board of Directors led by the respondents and passed a vote of no confidence in the Board of Directors (led by the 2nd and 3rd appellants among others) for allegedly demolishing the market resulting into loss of billions of shillings. They came up with resolutions appointing a new Board of Directors which included themselves and others and also notified the registrar of companies of the change of directorship

On 20th March 2015, the respondents wrote to the Registrar General, notifying him of their resolution to change directorship of the company in the meeting convened on 7th Feb 2015 at Already Hotel. In their letter, they accused the Board led by the 2nd appellant of;

i) Demolition of Kisekka Market on 22nd and 23rd December 2014 leading to loss.

ii) Failing to provide relocation site

iii) Gross Mismanagement and embezzlement of funds

iv) Lack of proper accountability

v) Exclusion and marginalization.

vi) Change of status of the company from company limited by guarantee to a company limited by shares thus dispossessing over 2500 members.

In the same vein, the Board led by the 2nd appellant wrote a complaint letter through M/S Lukwago and Co. Advocates dated 18th March 2015 complaining about the actions of the said persons calling themselves members appointing themselves as managers/directors of the company contrary to the laws governing companies and the articles and memorandum of association of the company and the legality of the documents submitted to the Registrar of Companies for registration to wit; resolutions and change of directorship documents.

On 23rd March 2015, the Registrar of companies wrote to the appellants and the respondents, referring to the respective letters written to the Registrar General by the two camps and advising that he was mandated to do an investigation into the complaints, and requiring the respondents to furnish to his office;

a) The notice calling for the meeting of 7th February 2015
b) Attendance register of the meeting of 7th February 2015
c) Minutes of the same meeting of 7th February 2015.

On 16th April 2015, the Registrar of companies then wrote a letter acknowledging receipt of the said documents and informing the respondents that he had studied the documents and was inviting the parties together with their legal representatives to appear before the registrar of companies on Tuesday 21st April 2015 at 9.00am for a final hearing.

On the day of the hearing, an Advocate from Namara,Twenda & Co Advocates by the names Sheila Namara representing the respondents appeared holding brief for Mr. Elvis Twenda of the same Law firm. In attendance was also the 1st and 2nd respondents, as well as the appellants and their advocate. Upon hearing orally from all the parties present, the Registrar of companies raised issues and made a ruling on 21st April 2015 as follows;

The Registrar in the ruling addressed three issues;

i) Whether or not the extra ordinary meeting held on 7th February 2015 was properly convened.
ii) Whether or not the decision passed in the meeting is valid/legally binding.
iii) What was the way forward?

In the findings, she decided as follows;

i) The extra ordinary meeting convened by the respondents was null and void because it was convened by two members (the 1st and 2nd respondents) contrary to section 139 of the Companies Act 2012,

which requires the directors of the company to convene a meeting upon requisition of the members, the requisition stating the objective of the meeting and signed by the requisitionists.

ii) The decisions passed in the said illegal meeting where the respondents appointed themselves as directors were null and void because they violated the Companies Act provisions on quorum, notices, voting rights, conveners, requisitionists and all other legal matters. The resolutions and forms which were presented for registration were therefore rejected because of their illegality.

iii) The respondents confused the role and meaning of subscriber /member and a director. Hence, they were not the directors of the company.

iv) The lawful directors of the company were Kisembo Robert Kasoro (the 2nd appellant and his board members)

v) The company should hold an Annual General meeting to be held with the aim of resolving the disputes of the company within 21 days and the resolutions be filed with the registrar.

The respondents again purporting to be implementing the decision of the Registrar of companies, purportedly issued a notice on 12th May 2015 calling for another extra ordinary meeting to be held on 19th May 2015 at Already Hotel with an objective of passing a vote of no confidence in the appellant's Board. The members then again issued a notice in the Daily monitor on 18th May 2015, calling for an extra ordinary meeting on 21st May 2015 (three days' notice, which they purportedly held and came up with minutes and resolutions again appointing themselves as directors of the company and registered the resolutions with the Registrar of documents.

In the meantime, the appellants wrote to the Registrar of Companies regretting that they would not be able to convene the meeting within the stipulated time due to logistical challenges.

On 16th June 2015, the Registrar General wrote to the 1st appellant acknowledging and sanctioning the meeting that was held by the 2nd appellant and his Board, but noted that the respondents had held a parallel meeting on 21st May 2015 and elected a new board irregularly and advising the respondents that under section 139 of the Companies Act, No 1 of 2012 members have no mandate to convene a meeting by themselves unless on a requisition through the directors for the said meeting stating the objectives of the meeting. More so, that the minutes arising from the purported meeting were registered with the Registrar of Documents under the Registration of Documents Act and that such cannot change the directorship of a company under the law. Thus the registrar of companies maintained the status quo of the company.

On 22nd July 2015, the respondents filed an application for judicial review against the Appellants, seeking for orders of certiorari, mandamus, prohibition, injunction, against the decisions of the Registrar of Companies of 21st April 2015 and 16th June 2015 respectively. The High court allowed the application on 18th August 2015 hence the above appeals to this honourable court.

Representation

When the appeals came up for hearing on 20th June 2022, the 1st, 2nd and 3rd appellants were represented by Mr. Brian Othieno and Mr. Godfrey

Himbaza whereas the respondents were represented by Mr. Ambrose Tebyasa and Mr. Deus Byamugisha Barutsya. The 4th -6th appellants were represented by Ms Nabaasa Charity, State Attorney in the Attorney General's chambers.

Consolidation of the Appeals

When the appeals were consolidated, the parties were directed to file their respective written submissions. The appellants had also filed Civil Application no. 14 of 2019 where they sought leave of this court to appeal against subsequent orders of Hon Justice Lydia Mugambe dated 27th September 2019 that arose from consolidated Miscellaneous Application numbers 139 of 2018 and 894 of 2017 where the respondents had filed applications in the High Court for interpretation of the earlier ruling on Judicial review, and also seeking for orders of contempt of court against the appellants among other orders. The application for leave to appeal was allowed by this Court by allowing the appellants to file an amended Memorandum of Appeal incorporating grounds of appeal into the earlier Memorandum of Appeal. The amended memorandum of Appeal was filed in this court on 28th June 2022 and the following grounds were set out for determination by the court.

Grounds of appeal

1. **The learned judge erred in Law and fact when she found that the Registrar General's decisions of 21st April 2015 and 16th June 2015 did not give the respondents a fair hearing and failed to direct the Registrar of Companies to give them another opportunity to be heard, when she held that the**

respondent led board was the legitimate interim Board and should call a Special General Meeting of the company, contrary to her jurisdiction in judicial review proceedings.

2. **The learned judge erred in Law and fact when she found that the board of directors led by the respondents was the legitimate board of the 1st appellant.**
3. **The learned judge misdirected herself on the evidence on record in regard to the illegalities of the respondents' meetings of 7th February 2015 and 21st May 2015 which informed the Registrar of companies' decisions, thus coming to a wrong conclusion.**
4. **The learned judge erred in Law and fact when she failed to properly evaluate the evidence on record and thus coming up with a wrong conclusion both in fact and in law.**
5. **The learned judge erred in Law when after signing off her ruling on 18th August 2017, she added another order by way of an addendum dated 12th September 2017 directing the respondents to hold a meeting within 30 days from the latter date.**
6. **The learned trial judge erred in Law and fact when she ignored the_glaring illegalities surrounding the convening of the meeting of 23rd November 2017 by the respondents and declaring as legal, the minutes and resolutions of the said meeting and directing them to be registered by the Registrar General.**
7. **The learned trial judge erred in Law and in fact when she misinterpreted clause (vii) of her orders in the Judicial review ruling to mean that the respondents were entitled to take possession of property comprised in Plot 9A Nakivubo Road.**

8. **The learned trial judge erred in Law and fact when in her interpretation of the Judicial review ruling she imported issues of property ownership which were not the subject of judicial review application.**

9. ***9.*** **The learned trial judge erred in Law and fact when she entertained Misc. Applications nos. 139/2017 and 894/2018 and made orders that had an effect of altering the ruling and orders in Miscellaneous cause no 109 of 2017 when she was already *functus officio.***

The duty of a first appellate Court

The duty of a first appellate court is set out in the law as well as in decided cases. It has been stated that the duty of a first appellate court is to re appraise the evidence on record and draw its own inferences. Rule 30(1) of the Judicature (Court of Appeal Rules) Directions SI 13-10 provides that;

1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may;

   a) Reappraise the evidence and draw inferences of fact.

The Supreme Court also clearly set out this duty in the case of **Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997 (unreported)** as follows:

> *"The first appellate Court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate court must then make up its own mind not disregarding the judgement appealed from but carefully weighing and considering it"*

Preliminary Objections

The respondents raised the following preliminary objections.

i) The instant Appeal is incompetent as it arises from an invalid Notice of Appeal in High Court Misc. cause no. 109 of 2015.

ii) The purported Notice of Appeal in High Court Consolidated Misc. Applications no.894 of 2017 and M.A No. 139 of 2018 is defective and or invalid as it offends rule 76(5) of the Court of Appeal Rules S.1 13-10.

iii) The 1st, 2nd and 3rd appellants are incompetent Appellants.

This honourable court has a duty to dispose of any preliminary objections whenever raised by any party to the appeal, at the earliest opportunity as the preliminary objections, if upheld by the Court have the effect of disposing of the whole suit/appeal.

i) The instant appeal is incompetent as it arises from an invalid Notice of Appeal in High Court Misc. Cause no. 109 of 2015.

Counsel for the respondents averred that the main appeal no. 266 of 2017 is invalid and incompetent as it arises from a defective notice of appeal. Counsel relied on Rule 75 (5) of the Judicature (Court of Appeal Rules) Directions S.I 13-10 which provides as follows;

"A Notice of Appeal shall be substantially in form D in the first schedule to the rules and shall be signed by or on behalf of the appellant"

Counsel argued that the Notice of Appeal which was filed together with the Record of Appeal on 20th December 2017 cannot be said to be a Notice of Appeal as much as it is endorsed by the Court of Appeal Registrar. Counsel argued that the defect is that the parties in the purported Notice of Appeal were altered and made to appear like it was a memorandum of Appeal

whereas not hence occasioning an illegality and thereby rendering the purported Notice of Appeal defective and a nullity under the Law and cannot be cured by the Registrar's endorsement or payment of court fees. Counsel further argued that a defective Notice of Appeal cannot initiate a valid appeal envisaged under Rule 83 of the Court of Appeal Rules. Counsel relied on **Gaba Beach Hotel Ltd vs. Cairo International Bank Ltd, Civil Application No. 34 of 2003** to support his submissions.

On the other hand counsel for the appellants in their submissions in rejoinder filed in this court on 17th August 2022, raised a point of law to the effect that the respondents were precluded from raising the preliminary objections without seeking Court's leave under Rule 102(b) of the Judicature (Court of Appeal Rules) Directions S.I 13-10. We agree with counsel for the appellants that for a party to raise preliminary objections about the competence of an appeal, the party ought to either file a formal application to strike out the appeal or seek leave of court before the preliminary objections are raised. Rule 102(b) of the rules provides as follows;

"A respondent shall not , without leave of the Court raise any objections to the competence of the Appeal which might have been raised by the application under rule 82 of these rules".

Rule 82 provides as follows;

"A person on whom a Notice of Appeal has been served may at anytime either before or at the institution of the Appeal apply to court to strike out the notice of Appeal or the appeal as the case may be on the ground that

no appeal lies or that some essential step in the proceedings has not been taken within the prescribed time".

A look at the record of this court does not reveal that the respondents sought for court's leave before raising the above preliminary objections and that the same was granted. We are inclined to agree with counsel for the appellants that the respondent's counsel is precluded from raising the objections at this point without leave of court. In the case of **Professor Syed Huq vs. The Islamic University in Uganda, SCCA NO. 47 Of 1995**, the Supreme Court ruled that preliminary objections as to the competence of an appeal could not lie without seeking the leave of court. The Supreme Court relied on rule 101(b) of the Supreme Court Rules (the equivalent of rule 102(b) of the rules of this Court) which provides for necessity to seek for Court leave before raising the preliminary objections.

Considering the merits of the 1st preliminary objection, the Court notes that the Notice of Appeal is on page 6 of the Record of Appeal and filed in this Court on 21st August not 20th December 2017 as alleged by counsel for the respondents. According to rule 76(5) of the rules of this Court, a notice of appeal shall be substantially in Form D in the first schedule to the rules and shall be signed by or on behalf of the appellant. A look at the First Schedule to the Rules shows that the Notice of Appeal on page 6 of the Record of Appeal is substantially in conformity with form D of the Rules and is signed by counsel for the appellants. We therefore find that the Notice of Appeal complained of does not offend the rules cited by counsel for the respondents. We accordingly overrule the first preliminary objection.

The 2nd preliminary objection raised by Counsel for the respondents was that the purported Notice of Appeal in High Court Consolidated Misc. Applications no.894 of 2017 and M.A No. 139 of 2018 is defective and or invalid as it offends rule 76(5) of the Court of Appeal Rules S.1 13-10.

The respondents further raised a preliminary objection in respect of the Notice of Appeal filed in respect of Consolidated Miscellaneous Application nos. 894 of 2017 and M.A No. 139 of 2018 on the ground that it offends rule 76 (5) of the rules of this court in that it bears the heading as if it is a memorandum of appeal. The Notice of Appeal referred to is in the supplementary record of Appeal filed on 28th June 2022. Counsel once again relied on **Gaba Beach Hotel Ltd vs. Cairo International Bank Ltd, Civil Application no. 34 of 2003**.

In response, counsel for the appellants contended that the defect was minor and did not go to the root of the matter nor did it cause any prejudice. Counsel relied on the authority of **Stephen Mabosi vs. Uganda Revenue Authority, SCCA No. 16 of 1995** where Court of Appeal ruled that substantive justice ought to be administered without undue regard to technicalities.

We accept the submission of counsel for the respondents that rules relating to the institution of appeals in this court are not mere technicalities that parties can ignore under Article 126 (2) (e) of the Constitution. They go to the root of substantive justice and the doctrine of fair trial. Indeed this was the position in the case of **Utex Industries Ltd vs. Attorney General, Civil Application No. 52 OF 1995,** where Supreme Court held that;

" ...**paragraph (e) contains a caution against undue regard to technicalities. We think the article appears to be a reflection of the saying that rules of procedure are handmaidens of justice-<u>meaning that they should be applied with due regard to the circumstances of each case</u>"(emphasis mine**).

We note that the Notice of Appeal complained about was filed on 30th Sept 2019, before Misc. Application no 14 of 2020, for Leave to Appeal which was filed on 17th January 2020. When the application for leave to appeal was called for hearing on 20th June 2022, Counsel for the respondents never raised any objection to the application nor did they raise the issue of defectiveness of the Notice of Appeal. Consequently, the application for leave to appeal was granted as well as the application for consolidation of the two appeals by way of amendment of the memorandum of appeal. The two appeals were consolidated into one appeal which is the subject of this judgment. All these events overshadowed the respondent's preliminary objection in respect of the defectiveness of the 2nd notice of appeal. We are therefore of the view that this objection was overtaken by events. As stated earlier, in the case of **Utex Industries** (Supra), rules of procedure should be applied with due regard to the circumstances of each case. We note that the case of **Gaba Beach Hotel Ltd** (Supra) is distinguishable from the current case. In the **Gaba Beach Case**, the respondent had filed and served a notice of appeal that was neither endorsed by the Registrar nor did it state the date and time of lodgment as required by the rules of the court.

In the instant case, the respondents complained that the parties in the Notice of Appeal were interchanged, and appeared in a different order from the

ruling of the trial Court. This appears to be the case, and in our view constitutes a breach of the Rules of this Court which require a Notice of Appeal to indicate the parties in the order reflected in the ruling/judgment appealed from. But we also note that this breach was cured after the court allowed consolidation of the appeals and amendment of the Memorandum of Appeal to constitute one appeal which is the subject of determination. This is coupled with the fact that the respondents did not seek for leave of Court to raise this preliminary objection as required under the rules of this court. In the premises, we would also overrule this preliminary objection.

The other objection was that the 1st ,2nd & 3rd appellants are incompetent appellants.

The respondents further raised a preliminary objection that the 1st appellant was the successful party in Miscellaneous cause no. 109 of 2015 and therefore could not lodge an appeal against a judgement that was delivered in its favour. In response, the appellants argued that this same objection was raised before the trial judge in Miscellaneous Application no. 682 of 2019 which sought for leave to appeal before her. Counsel averred that the judge overruled the preliminary objection on the basis that since both camps were claiming leadership of the company, they had the right to sue in its names.

It is not in dispute that there are two rival camps each claiming to be the rightful leaders of the 1st appellant. According to the record of appeal on page 10, the respondents filed application no. 109 of 2017 in the names of the 1st appellant as a party to the application together with them. It is not also in dispute that the 2nd and 3rd respondents were among the directors of the company before Misc Application no. 109 of 2017 was filed. Since they

were not satisfied with the decision in the Judicial Review application before the High Court, we do not see anything wrong with them challenging the decision by filing an appeal in the names of the 1st appellant company. Indeed, most of the reliefs sought in the appeal, affect the management of the 1st appellant company. It is only proper that the 1st appellant is a party to the proceedings. It is therefore our finding that the 1st appellant is a competent party to this appeal. This preliminary objection is also overruled.

The respondents further submitted that the 2nd and 3rd appellants were merely interested parties in the trial court and the orders made by the court therein were not directed against them. They further argued that if they had intended to be substantive parties to the proceedings, they would have applied to be joined to the proceedings. The respondents further argued that nevertheless, judicial review proceedings do not affect individual persons. They therefore argued that the two appellants had no locus to file the instant appeal and they sought the appeal to be struck out. The respondents argued that the only remedy that was available to the 2nd and 3rd appellants was to apply for review of the judge's orders under section 82 of the CPA and Order 46 rule 1 of the CPR.

In response, the 2nd and 3rd appellants contended that the respondents arguments are absurd. That the 2nd and 3rd appellants were actually sued jointly with the Registrar General, and the Registrar of Companies in Miscellaneous application no.109 of 2017. Counsel for the appellants referred to **page 10-17** of the main record of appeal. Counsel argued that the 2nd appellant also swore an affidavit in reply on **pages 86-91** of the record of

appeal. Counsel argued that it was during the proceedings that the trial judge opted to refer to them as interested parties. Counsel for the appellants further argued that the 2nd and 3rd appellants were also sued in consolidated Miscellaneous Application no. 894 of 2017 and 139 of 2018. That the appeal arising from the said consolidated applications was later consolidated with the main appeal which is a subject of determination.

I have noted that the 2nd and 3rd appellants were actually party to the judicial review application when it was filed by the respondents. The 2nd appellant actually filed an affidavit in reply as can be seen on **page 86-91** of the main record of appeal. It is also true that the respondents sued the 2nd and 3rd appellants for Contempt of Court orders among others. The said consolidated applications were later consolidated with the main appeal when it came up for hearing on 20th June 2022. It is therefore improper for the respondents to claim that the 2nd and 3rd appellants are incompetent parties to this appeal, when they are the ones who opted to sue them. It is trite law that an appeal is a creature of statute. A party has a right of appeal when the law provides so. When the Law does not provide so, the party applies for leave of court to appeal. Indeed, the 2nd and 3rd appellants applied to this court for leave to appeal the consolidated decision of the High Court, vide Court of Appeal Miscellaneous Application 14 of 2020 which was heard and granted by court on 20th June 2022. We therefore find that the 2nd and 3rd appellants are incompetent parties to this appeal. We therefore overrule this preliminary objection

Merits of the appeal

We shall now go on to consider the grounds of appeal as set out in the amended memorandum of appeal filed in this court on 28th June 2022. Counsel for the appellants opted to argue some grounds together and we shall resolve the grounds in the format set out in the parties' submissions.

Grounds 1 and 2

The learned judge erred in Law and fact when she found that the Registrar General's decisions of 21st April 2015 and 16th June 2015 did not give the respondents a fair hearing and failed to direct the Registrar of Companies to give them another opportunity to be heard, when she held that the respondent led board was the legitimate interim Board and should call a Special General Meeting of the company, contrary to her jurisdiction in judicial review proceedings.

The above ground of appeal is similar to the 1st ground of appeal in Consolidated Civil Appeal no. 297 of 2017 which reads as follows;

"1. The Learned trial Judge erred in Law and in fact when she failed to properly evaluate the evidence on record and made a finding that the appellants' decisions of 21st April 2015 and 16th June 2015 did not give the respondents a fair hearing"

We shall consider the above grounds concurrently.

In their submissions, Counsel for the appellants faulted the trial judge for substituting the decision of the decision making authority with her own. Counsel cited a text in the ruling on **page 343 of the record at page 4 of the judgement,** where the learned judge stated as follows;

"Judicial Review is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are engaged in the performance of public acts and duties...it is different from the ordinary review , revision, or appeal, ***the court's concerns are whether the decisions are right or wrong based on the laws and facts*** *,whereas the remedy of judicial review as provided in the orders of mandamus, certiorari and prohibition,* ***the court is not hearing an appeal from the decision itself but a review of the manner in which the decision was made****".*

Counsel submitted that the trial Judge then departed from the above authorities cited by herself and instead substituted the decision of the Registrar General with her own decision on **page 354 of the record (last paragraph on page 15 of the judgement)** as follows;

" The Judicial review application is allowed; the interim Board of Directors appointed therein of Kayita Geoffrey,Nakigudde Zulayika,Rwakijuma Simin Peter,Hajji Swaibu Zizinga,Kalungi Mubarak,Kasimu Muluba,Kato Mathias,Mulunda Denis,Nabale Janet,Nayiga Resty,Luwaga Daniel,Nalongo Nakimbugwe,Kavuma Annet,Kawooya Ben, Balinda Sam,Kiboneka Samson,Ochieng Peter, Bisaso Patrick,Kakande Yusuf, Ssewagudde Goeffrey and Semakula Yasin ***is the valid Board of the 1st Applicant but only in interim capacity".***

Counsel averred that this was tantamount to the court substituting the decision of the Registrar General which was that the appointment of the

respondents was illegal, null and void, with its own decision that the said appointment was valid and that the respondents were the valid board.

On the other hand, counsel for the respondents in response maintained that the trial judge made the correct decision when she pronounced the respondents and members of their Board to be the rightful Board of Directors of the 1st appellant company.

The decisions of the Registrar of Companies that were a subject of judicial review were two. According to the submissions of counsel, the two decisions were dated 21st April 2015 and another one by the same authority dated 16th June 2015. The two impugned decisions were faulted by the respondents for being arrived at without according the respondents a fair hearing contrary to the principals of natural justice.

In the decision of 21st April 2015, (**on page 32-35 of the Record of Appeal**) the Registrar of companies decided as follows;

i) The extra ordinary meeting convened by the respondents was null and void because it was convened by two members (the 1st and 2nd respondents) contrary to section 139 of the Companies Act 2012, which requires the directors of the company to convene a meeting upon requisition of the members, the requisition stating the objective of the meeting and signed by the requisitionists.

ii) The decisions passed in the said illegal meeting where the respondents appointed themselves as directors were null and void because they violated the Companies Act provisions on quorum, notices, voting rights, conveners, requisitionists and all other legal

matters. The resolutions and forms which were presented for registration were therefore rejected because of their illegality.

iii) The respondents confused the role and meaning of subscriber /member and a director. Hence, they are not the directors of the company.

iv) The lawful directors of the company are Kisembo Robert Kasoro (the 2nd appellant and his board members)

v) The company should hold an Annual General meeting to be held with the aim of resolving the disputes of the company within 21 days and the resolutions be filed with the registrar.

The 2nd decision of the Registrar of Companies that is under challenge is the decision dated 16th June 2015 (on page 76-77 of the record). The Registrar stated as follows;

"*We have come to learn that a faction of some members of the company went ahead and convened an extra ordinary meeting on 21st May 2015 and passed a resolution in which a new board was elected which was irregular. Pursuant to section 139 of the Companies Act 1 of 2012 , members have no mandate to convene a meeting by themselves unless on requisition through the directors for the said meeting, stating the objects of the meeting. Section 13 and 14 of the Registration of Documents Act Cap 81 empowers a Registrar to correct an error where it is satisfactorily proven that registration was procured by fraud or mistake and that such registration does not cure any defect in any document registered or confer upon it any effect or validity which it would not otherwise have had, except in so far as provided in this Act. The minutes arising from this meeting were registered with the Registrar of*

documents under the Registration of Documents Act Cap 81 and as such cannot change the directorship of a company under the Law. Please note that the appointment of new directors can only be effected by employing the provisions of the Companies Act No. 1 of 2012. As far as our office is concerned, the status quo of the company remains and the following persona;Rwakijuma Simon Peter, Swaib Zizinga and Kiboneka Sam are not permitted to transact any business on behalf of the company. Therefore your request to have the documents cleared is not granted"

The respondents were not satisfied with the above two decisions and decided to file the application for judicial review vide Miscellaneous Application no. 109 of 2015 which is the subject of this appeal.

It is well settled that the purpose of Judicial Review is to check administrative excess by subjecting administrative decisions to a review by the courts. This court dealt with this issue in **The Managing Director National Social Security Fund and 195 Others vs. Uganda Telecom Limited, Court of Appeal Civil Appeal No. 076 of 2018**. Hon Justice Cheborian Barishaki, JA cited with approval the case of **Attorney General vs. Tinkasimiire and Others, CACA NO. 208 of 2013 (unreported),** where this court quoted the passage by Highcourt (Mwangusya J) about the nature of Judicial Review;

" *The purpose of Judicial Review is concerned not with the decision but the decision making process. Essentially, review involves an assessment of the manner in which a decision is made. It is not an appeal and the jurisdiction is exercised in a supervisory manner, not to vindicate rights as such , but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality".*

The Court then stated;

"As rightly observed by the trial judge, in judicial review proceedings the court is not required to vindicate anyone's rights but merely to examine the circumstances under which the impugned act is done to examine whether it was fair, rational and or arrived at in accordance with the rules of natural justice"

In the Supreme Court case of Paulo **Kamya vs. Kampala District Land Board and Nazarali Panjwani (Administrator of the Estate of late ALIRAZAK PANJWANI) SCCA NO. 06 of 2013,** Hon. Justice Galdino M. Okello who read the lead judgment and had this to say in respect of Judicial Review;

"*Upon a careful consideration of the above arguments of counsel, the imposing question to answer is whether the High Court has powers in Judicial Review to substitute its decision for that of the Statutory or Public body properly charged with power of decision making in the matter.*" He cited the decision of Chief **Constable of North Wales Police vs. Evans (1982) 1 WLR 1155** where it was stated as follows;

"It *is not intended to take from those authorities the powers and discretions properly created in them by Law and to substitute the Courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner...the purpose of judicial review is to ensure that the individual receives fair treatment and not to ensure that the authority after according fair treatment reaches on a*

matter which it is authorized or enjoined by Law to decide for itself a conclusion which is correct in the eyes of the court".

The learned Justice Okello then went ahead and observed as follows;

"In Judicial review, the Court must concern itself with the manner in which the impugned decision was reached rather than with the decision itself. Its role is to ensure that the decision making authority exercises its powers in a proper manner as to give the individuals to be affected by its decision fair treatment. It should not concern itself with the correctness, in court's view of the decision after the authority had accorded to the individuals' fair treatment. I accept those expressions as the correct statement of the Law of Judicial Review. Rule 0(4) of the Civil Procedure (Amendment) (Judicial Review) Rules SI 75 of 2003 which provides thus 'Where ***the relief sought is an order of certiorari and the High Court is satisfied that there are grounds for quashing the decision to which the application relates, the Court may in addition to quashing the decision, remit the matter to the lower court, tribunal or authority concerned with a direction to reconsider it and reach a decision in accordance with the findings of the High Court.)'***

The learned Justice concluded as follows;

"From the reason given by the learned trial Judge ,it is clear that he had been moved to make the order of Mandamus by his fear that owing to the existence of a relationship between the Kampala District Land Board and the appellant characterized by so much bias against the 2nd respondent, the correct decision in my view would not be reached if he

remitted the matter to KDLB. In my opinion this was with respect, a wrong consideration to take because in a Judicial review the court is not concerned with the correctness of the decision but rather with the process leading to the decision....while I agree that Courts have a constitutional duty to ensure that justice is done to all, this duty is subject to the Law. Making an order when the Court has no jurisdiction to do so is not a matter of technicality but of substantive law as jurisdiction is granted by statute.

As seen in the case of **Paulo Kamya case (supra),** the Supreme Court has already determined that in a judicial review application, the High Court has no Jurisdiction to alter or substitute its decision for that of the Statutory or public body properly charged with power of decision making in the matter. The court must concern itself with the manner in which the decision was reached and not with the decision itself.

We agree that the decision of the trial Judge that substituted the decision of the Registrar of Companies is a nullity as it was made without Jurisdiction. We find that the learned trial judge exceeded her jurisdiction when she confirmed the respondents' Board as the valid Board of Directors of the 1st appellant. The trial judge stated as follows (on page 354 of the record of appeal);

"i) the interim Board of Directors appointed therein of Kayita Geoffrey, Nakigudde Zulayika, Rwakijuma Simon Peter,Hajji Swaib Zizinga, Kalungi Mubarak, Kasimu Mulumba, Kato Mathias, Mulunda Denis, Nabale Jannet, Nayiga Resty,Luwaga Daniel, Nalongo Nakimbugwe,Kavuma

Annet,Kawooya Ben,Balinda Sam, Kiboneka Samson,Ochieng Peter,Bisaso Patrick,Kakande Yusuf,Ssewagudde Geofrey and Semakula yasin is the valid Board of the applicant". With due respect, the learned trial judge did not have jurisdiction to replace her own decision with the decision of the Registrar of Companies. In light of the authorities cited above, that is not the purpose of judicial review. More so, court has no jurisdiction to interfere in matters relating to internal management of a company. Election of members of the Board of Directors is a preserve of the members of the company at the General meeting.

The respondents further complained that the Registrar of Companies denied them the right to be heard when she made the two impugned decisions. On the issue whether or not the respondents were not accorded a fair hearing, the appellants averred that the right to be heard was fully accorded to the respondents. They argued that due care was taken to ensure the respondents are accorded a hearing with total fairness. Counsel for the appellants referred to a letter of 23rd March 2015 (on **page 26 of the record of appeal),** addressed to the respondents and copied to the appellants, where the Registrar General referred to the letter of 20th March 2015 referenced URSB/01/03/15 written by the respondents raising issues of gross mismanagement, misappropriation and embezzlement of members funds and the letter by the appellant's lawyers ref no. LC/001/2015/CK dated 18th March 2015 raising a complaint on behalf of the appellants about the manner in which the respondents sat and elected themselves as the new Board of Directors, the Registrar General cited her powers under section 172 of the Companies Act to conduct investigations. Counsel argued that the Registrar asked the

respondents to furnish her with the meeting documents by 26th April 2015 to wit;

i) The notice calling for the meeting of 7th February 2015.

ii) Attendance register of the meeting of 7th February 2015.

iii) Minutes of the same meeting of 7th February 2015.

Counsel for the appellants contended that on 26th March 2015, the respondent's lawyers Namara, Twenda & Co Advocates wrote a letter to the Registrar General forwarding the said documents. **(Counsel referred to Page 30 of the record of Appeal**). Counsel averred that on 16th April 2015, the Registrar General wrote to the parties' lawyers (Appellants and Respondents) (**letter on page 28 of the record of appeal)** calling for a hearing of the parties' complaints on 21st April 2015 at 9.00 am. It was contended that all the parties attended including the respondents and their Lawyer Catherine Namara Matsiko holding brief for Elvis Twenda and that the 1st respondent was present in person together with Hajjati Saka one of the respondent's "board" members. That upon hearing both sides, the Registrar General's representative Ms. Mercy Kyomugasho delivered her decision on the same day 21st April 2015 **(on page 32-33 of the record) and on page 33** she stated,

"Subsequently, as a result of the said complaints and objections, this office caused several meetings and hearings with the two different "camps" to be held as required under section 287 of the companies Act. An investigation into the affairs of the company was commenced under sections 172 and 173 of the Companies Act in which further evidence was produced. The parties were advised to furnish the registrar of companies with the notice of the meeting in question, evidence of notice and

attendance list of the meeting and the minutes that passed the resolution to appoint the said new directors..."

Counsel for the appellants contended that the said ruling clearly indicates that the parties were given adequate opportunity to be heard by being asked to furnish their documents and being allowed to orally address the Registrar before her ruling. Counsel argued that the trial judge failed to appreciate that the procedure which was followed leading to the impugned decisions was done in compliance with sections 172, 173, and 287 of the Companies Act.

Counsel for the appellants in Consolidated Appeal No. 297 of 2017 in their submissions filed in this court on 21st March 2022, seemed to agree with the averments of counsel for the appellants in consolidated appeal no 266 of 2017.

They argued that the Registrar General held several meetings and hearings with all the parties and conducted investigations into the matters arising from the complaint. That subsequently, the Registrar General by letter dated 16th April 2015 invited the parties and the legal representatives of the two sides of the dispute to appear before the Registrar of Companies for hearing on 21st April 2015. That the 2nd, 3rd, 4th and 5th respondents were at the hearing and were represented by Namara Catherine Matsiko of M/S Namara ,Twenda & Co. Advocates, holding brief for Mr. Elvis Twenda. That it was after this decision that the members were directed to convene an Annual General Meeting on 30th April 2015.

In response to the appellants submissions, Counsel for the respondents averred that there was no hearing at all that was accorded to the respondents. That at the hearing, there was no representative of the respondents. They also submitted that they were denied legal representation since their lawyer Mr. Elvis Twenda was not available at the hearing.

It was stated in the affidavit of Ms. Jackline Anago filed on behalf of the Registrar of Companies, as follows:

"Subsequently, by letter dated 16th April 2015, the Registrar General invited the legal representatives of the two camps to appear before the Registrar of Companies for a hearing on 21st April 2015.The 2nd -5th applicants were represented by M/S Namara ,Twenda & Co. Advocates and after listening to both Counsel, the Registrar delivered her decision."

This was echoed in the affidavit in reply of the 2nd appellant Kisembo Robert Kasoro, where it was stated:

> *"At the hearing of 21st April 2015, the 2nd applicant was present in person together with Hajjat Saka who together with the rest of the applicants were represented by Ms Catherine Matsiko who was holding brief for Mr. Elvis Twenda, and after listening to both parties Ms Mercy Kyomugasho delivered the decision." There was no affidavit in rejoinder sworn and filed by the respondents contesting the above evidence."*

On whether the respondents were granted a fair trial by the Registrar of Companies, the learned trial Judge found as follows:

"It is not discernible in what capacity Ms. Namara may have attended the meeting if she did. It cannot be safely said in these circumstances that Ms. Namara's presence was to sufficiently represent the applicants in the exercise of their right to be heard. Moreover, even if I believed Mr. Kasoro that Ms. Namara was on brief, ***the practice is that a lawyer on brief does not defend the client but watches what goes on and reports back to the lawyer whose brief he had. Such Lawyer on brief does not necessarily exercise the client's right to be heard unless demonstrated otherwise."***

We hold a different view. We note that Ms. Namara who appeared at the hearing before the Registrar on behalf of the respondents, was an advocate with the capacity to ably represent her clients' interests. We further note that the practice is that a lawyer who is asked to hold another's brief is taken to have been received enough information about the case so as to ably represent his/her clients. In the case of **Kwesiga Derrick vs. Prof. John Kigundu, Miscellaneous Application no. 1137 of 2017 (arising from civil suit no 1174 of 2015)**, Madrama, J. (as he then was) said;

"On the same point, the applicant's Counsel ought to have briefed another Lawyer to appear because a court has discretionary powers whether to grant a prayer for adjournment or not, a brief should be to handle the application in case adjournment is refused. A brief to appear on behalf of another lawyer ought to be to handle the whole matter and not just an application to adjourn which can be refused"

A look at page 352 **of the record-page 13 of the judgement,** the judge stated that

"It is not clear why the respondent did not consider the Applicant's lawyer's request for an adjournment of the meeting from 21st April to 23rd April at 3.00Pm or 24th April at 9.00am. No explanation is given by the respondents for this failure...."

She went ahead **on page 353 of the record-Page 14 of the judgement;**

"Because the decisions were reached without allowing the adjournment to enable sufficient legal representation of the applicants at the meeting, they were reached in violation of the applicant's right to be heard. This was irregular, unfair and unlawful and the two decisions are null and void."

In view of the above analysis, we do not think the learned trial Judge was justified to criticize the Registrar for opting against adjourning the hearing so as to allow Mr. Twenda to attend the hearing. It is well established that the granting of an adjournment is an exercise of discretion. This position was extensively discussed by the Supreme Court in the case of **Betuco (U) Ltd and Another vs. Barclays Bank of Uganda Ltd and 3 ORS, SCCA NO. 1 of 2018,** the Richard Buteera JSC (as he then was), determining the issue whether the Court of Appeal's refusal to grant an adjournment violated the appellant's right to legal representation which in turn was a violation of article 28(1) of the Constitution, the Justice recited Article 28(1) which provides as follows;

"1. In determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by Law" The Justice then stated that sufficient reason has to be demonstrated to secure an adjournment...an adjournment is not granted as of right but is only granted for sufficient cause with the exercise of discretion. The learned Justice observed that the court has on an earlier occasion handled an issue to do with an adjournment in the case of **Famous Cycle Agencies Ltd and Others vs. Mansukhlal Ramji Karia and Others, SCCA NO. 16 OF 1994**, where court held as follows;

"Under this rule, the granting of an adjournment to the party to the suit is thus left to the discretion of the court. The discretion is not subject to any definite rules but should be exercised in a judicial and reasonable manner. It should be exercised after considering the party's conduct in the case and the opportunity he had of getting ready...what is sufficient cause depends on circumstances of the case..."

In the instant case, the circumstances did not warrant an adjournment given that the parties were represented by Counsel Catherine Namara Matsiko and they themselves were present to narrate the facts to the Registrar. Furthermore, the parties were given an opportunity to furnish to the Registrar all the documents in support of their cases. It is our view, that there was no better hearing that could be accorded to the respondents.

The other decision complained about was the decision of 16th June 2015, in which the Registrar, decided to maintain the status quo. She wrote as follows:

"We have come to learn that a faction of some of the members of the company went ahead and convened an extra ordinary meeting on 21st May 2015 and passed a resolution in which a new board was elected, which was irregular. Pursuant to section 139 of the Companies Act No. 1 of 2012, members have no mandate to convene a meeting by themselves unless on requisition through the directors for the said meeting , stating the objects of the meeting...Sections 13 and 14 of the Registration of Documents Act Cap 81 empowers a registrar to correct an error where it is satisfactorily proven that registration was procured by fraud or mistake and that such registration does not cure any defect in any document registered or confer upon it any effect or validity which it would not otherwise have had, except in so far as provided in the act...the minutes arising from this meeting were registered with the registrar of documents under the Registration of Documents Act Cap 81 and as such cannot change the directorship of the company under the Law...The status quo hereby remains". This letter was basically repeating what had been discussed in the decision of 21st April 2015 and was restating the position of the Law.

In respect to the above decision, the learned trial Judge found as follows:

"Following through, the respondents made another decision on 16th June 2015 cancelling any registration of documents in the company file by the new Board. The grand effect of these two decisions/letters was that the

applicants resolution that had been filed with the new directors of the first applicant was deregistered and they were removed as directors of the first applicant. Clearly, these decisions affected the applicants."

We must emphasize our earlier decision that the Registrar of Companies afforded the respondents a fair hearing before deciding to maintain the status quo in the management of the 1st appellant. The letter of 21st April, 2015 merely informed the respondent that they had improperly registered documents relating to the 1st appellant. It did not affect the respondents in anyway.

We also noted that the respondents also challenged the Registrar's decisions basing on grounds that were not raised in the lower Court. They averred that there was no valid petition before the Registrar General as required under section 173 of the Companies Act to have warranted the Registrar general to conduct a hearing or investigations into the affairs of the company. They averred that acting without a formal petition was an illegality that effectively rendered the purported proceedings before the Registrar General a nullity. In their submissions they called upon this court to "properly evaluate the evidence on record and make an appropriate finding". They further argued that the Registrar General never had powers under section 172(5) of the Companies Act to make the decisions complained about. As rightly stated by counsel for the respondents, this Court has a duty to evaluate evidence on record. The issue whether there was a formal or valid petition filed by the members is a question of fact which ought to have been brought before the trial court, and the appellants would then have an opportunity to respond to by way of

affidavit evidence. These issues were not brought to the attention of the trial court. This court is therefore unable to make appropriate findings at this level.

Further, we do not agree, as counsel for the respondents submitted that the Supreme Court authorities of **Paulo Kamya, Kampala District Land Board, Betuco Ltd, and Famous Cycle Agencies Ltd (all supra)** have the effect of amending and or repealing Articles 28,42 and 44 of the Constitution of Uganda and that they are illegal, null and void. We emphasize that the Supreme Court's mandate to adjudicate cases is derived from the Constitution. Counsel has not demonstrated how the said Supreme court authorities tend to amend or repeal the constitution, so as to justify his submissions which constitute an indirect attack on the Supreme Court, the highest appellate Court in our country.

In effect, Grounds 1 & 2 of Consolidated Civil Appeal no. 266 of 2017 and Ground 1 of consolidated Civil Appeal no.297 of 2017 hereby succeed.

Ground 3

The learned judge misdirected herself on the evidence on record in regard to the illegalities of the respondents' meetings of 7th February 2015 and 21st May 2015 which informed the Registrar of companies' decisions, thus coming to a wrong conclusion.

The appellants complained that the learned trial judge ignored the various illegalities as pleaded by the appellants that tainted the various meetings organized and convened by the respondents. Counsel for the appellants pointed out that the process used to call and or conduct company business

by the respondents at the purported meetings of 7th February 2015 and 21st May 2015 including the process of appointing new directors in the said meetings was not only irregular but also illegal for failure to follow and or meet the duly prescribed process and procedures and requirements highlighted under the Companies Act as well as the Companies Articles and Memorandum of Association. Counsel outlined the illegalities complained of that tainted the respondents meetings of 2nd February 2015 and 21st May 2015 as follows;

i) There was failure to give adequate notice for the extra ordinary meetings. Counsel argued that under section 140 of the Companies Act it is provided that all meetings other than adjourned meetings should be given 21 days notice to members. Counsel contended that as noted by the Registrar General in her ruling, the meeting of 7th Feb 2015 violated the requirement as to notice. That furthermore, the meeting of 21st May 2015 also lacked adequate notice which was illegal. That on page 45 of the record, a notice was issued in the Daily Monitor of 18th May 2015 for an extra ordinary general meeting to be held on 21st May 2021. This was just three days notice which was in violation of the provisions of the companies Act on issuance of Notice.

ii) That there was failure of the respondents or any such member of the company let alone the required one tenth of the Company's voting members to requisition from the directors of the company , an extra ordinary meeting before they could proceed to call for the said meetings. Counsel argued that the trial judge turned a blind eye to all these illegalities, and ignored the rule that an illegality

once brought to the attention of court overrides all other matters before it.

Under Article 9 of the 1st appellant's Constitution(Articles of Association) read together with section 139 of the Companies Act,2012 the process of calling for an extra ordinary meeting of the 1st applicant is described as follows;

a) Directors may whenever they think fit, convene an extra ordinary general meeting or;
b) An extra ordinary General Meeting can also be convened on such requisition or in default it may be convened by such requisitionists. Counsel submitted that it was never adduced by the respondents who were not directors of the company that they ever requisitioned for an Extra Ordinary meeting nor is there any proof that any such requisition was deposited at the registered office of the company as is required by section 139(2) of the Companies Act.

That there was also failure by the respondents or such member(s) of the company to deposit/issue at the registered office of the company, a notice of their intention to propose any of the persons purporting to have been elected as directors of the company and a notice by the proposed persons purporting to have been elected as directors of the 1st applicant and a notice by the proposed persons indicating their willingness to be elected as directors in the company. According to Article 47 of the 1st appellant's Articles and Memorandum of Association no person other than a retiring Director shall unless recommended by the directors be eligible for reelection to the office of director at any general meeting

unless any such member, qualified to attend and vote at the meeting for which such notice is given leave at the registered office of the company not less than three or more than 21 days before the date appointed for the meeting, a notice in writing signed by him/her of his/her intention to propose such persons to be elected as directors of the company and also a notice in writing by the proposed person of his willingness to be elected as such.

c) That there was also lack of quorum to conduct company business in both meetings of 7th February and 21st May 2021. It was deposed by the 2nd appellant in his affidavit in reply dated 17th Feb 2017 on page 140-147 of the record, paragraph 7 (e)(v) that the venue that the respondents claim to have had the extra ordinary general meeting electing them and several others as directors cannot accommodate more than 100 people let alone 50% (of a membership of about 1850 members) of the company's members, which is the number required to make a quorum able to conduct business at any general meeting as is prescribed by Article 13 of the Companies' Constitution.

d) The appellants further argued that in addition to all the above, the documents arising from the irregular meeting of 21st May 2015 purportedly changing the directorship of the company were filed and registered under the Registration of Documents Act, Cap 81. The appointment of new directors can only be effected by employing the provisions of The Companies Act no.1 of 2012 and not the Registration of Documents Act Cap 81 and as such, the documents registered with the Registrar of documents by the respondents cannot be seen as changing the directorship of the company

e) They argue that in fact, the directors of the company that is , the 2nd and 3rd Appellant and the board they head were purportedly removed from office as directors without affording them a hearing contrary to the rules of Natural Justice. The appellants were never given a hearing at all before their purported removal.

We note that Article 47 of the 1st Appellants Articles and Memorandum of association is equivalent to section 149 of the Companies Act on the requirement for notice in case of a special resolution that members intend to pass. Members of a company are bound by its Articles and Memorandum of Association. Indeed, Articles of Association constitute the Constitution of the Company. We do not see any evidence that the respondents followed the said requirements under the Companies Act and the Articles and Memorandum of the Company in convening the meetings that they purported to convene.

Furthermore, section 139 of the Companies Act 2012 lays down the procedure that members of a company must follow before convening a meeting. Section 139 provides as follows;

"139(1) The Directors of a company not withstanding anything in its articles shall on the requisition of the members holding not less than one tenth of the paid up capital of the company as at the date of the deposit of the requisition, proceed to convene an extra ordinary General Meeting of the Company.

(2) The requisition must state the objects of the meeting and must be signed by the requisitionists and deposited at the registered office of the company

and may consist of several documents in like form each signed by one or more requisitionists.

(4) A meeting convened under this section shall be convened in the same manner as nearly as possible as that in which meetings are to be convened by the directors."

The only way members can legally convene a meeting of the company other than the Board of Directors is under section 139 of the Companies Act. There is no evidence that the respondents complied with the above section when they convened the meeting of 7th February 2015 and 21st May 2021. Any resolutions arising from an illegally convened meeting could not have any legal force.

The respondents in their submissions on page 18, seem to agree with the position that members' meetings are convened upon a requisition being deposited with the directors of the company. The respondents cited the case of **Bugerere Coffee Growers Ltd vs. Ssebaduka and Anor [1970] 1 EA 147 and Buikwe Estate Coffee Ltd and 2 Others vs. Luhabi and Anor HCCS No.** 700/1961 where it was held as follows;

> *"The Board of Directors having refused and failed to convene any meeting of the company within 21 days of the date of deposit of the requisition, the requisitionists then became entitled to convene a meeting under aid by virtue of S. 132 (2) of the Companies Act and thus they proceed to do by printed notice issued to the shareholders"*

In the instant case as already observed, the respondents did not deposit the requisition as required by law before holding the meetings. The remedy of mandamus is not available to an applicant, where the act sought to be done

is in clear violation of the Law and would be tainted with illegality. The applicants in their application sought for mandamus compelling the Registrar General to register and effect changes reflecting the resolutions passed on 7th Feb 2015 and 21st May 2015 by the members of the 1st applicant. Not only were the resolutions registered with the Registrar of Documents, and therefore of no legal force to effect change of directorship in the company, but they were a result of a meeting that was illegally convened by some members without authority and more so in violation of the provisions of the Companies Act and the Articles and Memorandum of Association. The trial judge indeed failed to see these glaring illegalities. Ground 3 also succeeds.

Ground 4

The Learned Judge erred in Law and Fact when she failed to properly evaluate the evidence on record and thus came to a wrong conclusion

The appellants contend that the trial judge failed to evaluate the evidence adduced before her in order to come up with the right decision. That on the 1st and 2nd ground of Appeal, the judge failed to consider that the respondents were given adequate hearing, by way of asking them to furnish all their documents to the Registrar General and calling them for hearing on 21st April 2015.

The appellants further argued that despite the fact that they laid before the judge cogent evidence of illegalities committed by the respondents in their meetings where they purported to remove the appellants as directors, the trial judge failed in her duty to evaluate the evidence before her.

In response, counsel for the respondents maintained that the trial judge properly evaluated the evidence before her.

This ground of appeal offends rule 86(1) of the rules of this Court. It does not concisely state the grounds of objection to the decision appealed against and does not specify the points which are alleged to have been wrongfully decided. The specified points of evidence which the court failed to evaluate are unknown. This court has already decided in the case of **Vambeco Enterprises Ltd vs. DHL Global Forwarding (U) Ltd & Anor, CACA NO. 2003 of 2015** where Lady Justice Mulyagonja JA relied on **Attorney General vs. Florence Baliraine, CACA NO. 79 of 2003** where this Court emphasized that grounds of appeal must concisely specify the points which are alleged to have been wrongly decided. That the practice of advocates setting out general grounds of appeal which allow them to go on a general fishing expedition at the hearing of the appeal hoping to get something themselves do not know must end.

Ground 4 must therefore fail.

Ground 5

The learned judge erred in Law when after signing off her ruling on 18th August 2017, she added another order thereon by way of an addendum dated 12th Sept. 2017 directing the respondents to hold a meeting within 30 days from the latter date

The appellants submitted that when the trial judge signed off her ruling on 18th August 2017, she automatically became *functus officio* and therefore could not subsequently add other orders to her ruling. The appellants argued

that the days within which the purported Board was to call for a general meeting were 30 days and started running from 18th August 2017. That the respondents failed to call for the said meeting and the Judge then extended the days by adding an addendum on 12th September 2017, notwithstanding that she was *functus officio.*

The contentious ruling by the learned trial Judge was as follows:

> "In *the interest of justice, considering the written ruling has become available to the parties on 12th September 2017, the 30 days directed for the extra ordinary general meeting and any other timelines shall run from today".*

According to the appellants, the judge was already *functus officio* and could not add other orders to the orders issued on 18th August 2017. The effect was that the respondents failed to call for the meeting within the time stipulated in the ruling.

In response, counsel for the respondents argued to the contrary that the trial Judge was not *functus officio* but just enlarged time in order to give effect to her earlier ruling. They agreed that indeed the Judge had directed that the meeting be held within 30 days from the date of the ruling, but it became practically impossible as the respondents herein could not execute an informal order as the ruling had not yet been officially delivered to the parties. The respondents relied on section 96 of the Civil Procedure Act which states as follows;

> "Where any period is fixed or granted by the court for doing of any act prescribed or allowed by this Act, the Court may, in its discretion from

time to time enlarge that period, even though the period originally fixed or granted may have expired".

We note that the term " *Functus Officio*" is defined in **Black's Law Dictionary 9th edition Bryan A. Garner,** as follows;

"Functus Officio-Having performed his or her office-An officer or official body without further authority or legal competence because the duties and functions of the original commission have been fully accomplished"

It is our considered opinion that the learned trial Judge did not, by her ruling, add any new orders to her original ruling, but merely extended time to give effect to the order in her original ruling, that "the respondents should hold a Special General Meeting within 30 days". We find that she had the power to enlarge time under Section 96 of the CPA. Consequently, Ground 5 fails.

Ground 6

The learned trial judge erred in Law and fact when she ignored the glaring illegalities surrounding the convening of the meeting of 23rd November 2017 by the respondents and declaring as legal, the minutes and resolutions of the said meeting and directing them to be registered by the Registrar General.

The appellants argued that the respondents' meeting convened on 23rd November 2017 was tainted with various illegalities. They cited the trial judge's ruling in the judicial review application where she directed that the respondents were the lawful directors of the 1st appellant and that they should hold the position in an interim capacity for 30 days until they

hold a Special General Meeting of the company in order to resolve the management wrangles that were prevailing between the two camps. According to the appellants, the notice calling for the meeting was advertised in the Monitor Newspaper of 31st October 2017, (at Page 4 of the Supplementary Record of Appeal filed on 10th December, 2019) which was two and a half months from the date the ruling was delivered on 18th August 2017. According to the Notice, the meeting was supposed to take place from Club Obligato starting at 9:00 am.

The appellants further contended that since the trial Judge had directed that all members of the company should participate in the meeting, there arose a wrangle between the appellants and the respondents on which people should attend the meeting. That consequently, on the date the meeting was to be held, that is, 23rd November 2017, the Kampala Metropolitan Police Commandant called for a meeting to chart ways of holding a peaceful meeting. That the meeting was attended by the appellants, as well as the 2nd respondent representing the respondents' other camp. That in attendance too was Ms Jane Okot P' Bitek Langoya representing the Registrar General since the trial Judge had directed that the Registrar General should be in attendance. Counsel for the appellants stated that in the meeting it was resolved that;

i) There would be no meeting until the register for the members of the company is updated and harmonized.

ii) That both parties with their lawyers go back to court for interpretation of the Law in regard to membership as to who should

participate in the meeting or not as guided by the minister of Kampala Capital City Authority and Kampala Metropolitan Police.

iii) They should get back to the Commander KMP for further rescheduling of this meeting.

(The minutes of the said meeting are on page 30 of the Supplementary Record of Appeal filed in this Court on 10th December 2019).

Counsel submitted that despite the agreement by the members to adjourn the meeting, the respondents went ahead to mobilise a few people loyal to them, some of them were non members of the company, and they purported to convene the meeting at **OPEN HOUSE, BUGANDA ROAD**. That first of all, this was not the venue appointed and advertised in the Notice of General meeting, even the time appointed for the meeting which was 9.am was changed to 1.45PM. That more so, the quorum was not enough for them to transact business. Counsel further submitted that indeed even the 2nd respondent's letter dated 27th November 2017**(at page 9-10 of the Supplementary Record of Appeal) clearly states that the meeting was attended by 427 members and the same took place at 1.40 PM.**

The respondents in response, averred that the meeting was held in total observance of all legal provisions and that the trial court too held in the affirmative. The respondents averred that the reason why they delayed to convene the meeting within the time prescribed by the court was because there was an interim order issued by Hon. Madrama, J (as he then was) that lapsed on 25th October 2017. We agree with the respondents that they could not convene the meeting as directed by the trial judge in the pendency

of an interim order. That explains why they convened the meeting on 23rd November 2017.

However, much as they had the mandate to convene the meeting, they had the duty to convene it lawfully and in observance of the provisions of the Companies Act that regulate holding of Companies' meetings.

Further, we noted that the learned trial Judge's ruling which was as follows:

"I am aware that when I directed a meeting of the company at the early stages of this hearing, there were claims that some members in the interested parties' camp were denied entry to the venue and voting by members in the interested parties camp. By order of this court, all members from the original list of members in the respondent's register and who have not sold their shares should be allowed to attend and vote or otherwise take part in the meeting. Membership should not be based on allegiance to or belonging to a particular camp or some technical creature that is defeatist".

We wish to stress that the respondents had a duty to ensure that legal requirements as to Notice, quorum, voting and other requirements were duly complied with. Under article 13 of the companies Articles and Memorandum of Association (**on pages 148-165 of the main Record of Appeal, specifically page 154)**, provides that "No business shall be transacted at any general meeting unless a quorum is present at the time when the meeting proceeds to business, save as herein otherwise provided, 50% of the members present in person shall for a quorum".

According to Article 14 of the companies Memorandum and Articles of Association, "If within an hour from the time appointed for the meeting a quorum is not present, the meeting , if convened upon the requisition of members shall be dissolved. In any other case, it shall stand adjourned to the same day in the next week at the same time and place or such other day and at such other time and place as the directors determine,....."

In the instant case therefore, the meeting ought to have had the requisite quorum of 50% which it did not have as confirmed in the respondent's own letter referred to above where they confirmed that the meeting was attended by 427 people. We also note that the company had a membership of at least 1858 members as seen from page 166-213 of the Record, 50% of the members as appears in the record would be 929 members. The meeting where only 427 members attended as clearly stated in the respondents letter dated 27th November 2017 (in the last paragraph of the letter on page 9-10 of the supplementary record of appeal) clearly lacked quorum and was therefore not a lawful meeting of a company. The deliberations therein cannot therefore bind the company. According to Article 14 of the company's Memorandum & Articles of Association, " If within an hour from the time appointed for the meeting , a quorum is not present, the meeting, if convened upon the requisition of the members, shall be dissolved. In any other case it shall stand adjourned to the same day in the next week at the same time and place or such other day and at such other time and place as the directors determine..."In the instant case therefore the meeting ought to have been adjourned since there was no quorum but the respondents went ahead to convene the same. The learned trial judge ought to have

known that any resultant minutes and resolutions from an illegal meeting cannot be legal in any sense.

We also wish to state that the procedure in the meeting was lacking. No voting took place at all. The resolutions that were passed were mere recommendations from one member which were seconded by another member and the respondents extracted the same. This can be deduced from pages 11-16 of the Supplementary Record of Appeal (The minutes of the meeting of 23rd Nov. 2017.) More so on page 14 of the supplementary record of appeal, the members opted to pass a resolution extending their mandate as an interim board . The meeting resolved as follows;

1. " The tenure of the Interim Board is hereby extended until the election of a substantive Board of Directors by the next Annual General Meeting"

In view of the foregoing analysis, we find that the meeting of 23rd November 2021 was tainted with illegalities. Consequently, this ground also succeeds.

Grounds 7 and 8: The learned trial judge erred in Law and in fact when she misinterpreted clause (vii) of her orders in the judicial review ruling to mean that the respondents were entitled to take possession of property comprised in plot 9A Nakivubo Road

The trial judge in her ruling made several orders (**on page 354-356 of the Record of Appeal)** and under clause (vii) of her orders, stated as follows;

"For avoidance of doubt, this court is aware of the construction of a modern market that is ongoing at the premises of the 1st Applicant. Nothing in this

ruling should be read to fetter the continued and uninterrupted construction of the market or legal ownership of stalls and shops in this market by those who have paid for them".

According to counsel for the respondent the ordinary meaning of this order is that the ruling did not affect construction of the market and that it was to continue unfettered, without interruption. Furthermore, that it meant that the contractor on site **(Roko Construction (U) Ltd)** was to continue construction of the market, since they had completed only 2(two) out of the Four (4) blocks for which they had contracted.

Counsel argued that the respondents attempted to file an application for vacant possession sometime in March 2019, and the High Court (Execution Division) struck out their application on the basis that there was no such order in the ruling. That the respondents then filed an application for interpretation of clause 8 and 9 of the Judicial review ruling seeking among others an order "**granting vacant possession to harmoniously develop the remaining portion unfettered as the correct interpretation of the entire clause 9 of the court order".**

Counsel cited the trial judge's directive in her consolidated ruling on page 63-69 of the Supplementary Record of Appeal) and specifically page 6 paragraph 18 of the ruling, that;

"For clarity, nothing in clause 8 & 9 or any part of the extracted order and ruling of court entitles the Respondents (Appellants herein)(the Nsimbi-Robert Kasoro led group to block the Applicants from utilizing the

undeveloped part of the suit land if it was so decided at the Special General Meeting of the first Applicant called by the legal board led by Kayita Geoffrey"

The judge went ahead and stated in clause 20 of the ruling;

"The issue of determining what to do with the vacant part of the suit land comprised in LRV 4256 Folio 8 Plot 9A1 Nakivubo road was determined at the Special General Meeting convened by the Kayita led board held on 23rd November 2017.Resolution 7 addresses this issue well and must be registered and implemented"

Under clause 21. She said;

"Resolution 7 of this meeting in annexture D to the affidavit in support of Misc. Application no.894 of 2017 was passed in a Special General Meeting held on 23rd November 2017 by the legal Kayita led board in line with par 42(iii) of the ruling in Misc. Application no. 109 of 2015 and paragraph 4 of the Court order there from. This meeting was properly advertised as required and the resultant resolutions are legally binding on the first Applicant...."

Counsel for the appellants argued that the trial judge confirmed as legal, resolutions of an otherwise illegally convened meeting and more so confirmed the issue of taking possession of property at Nakivubo when it was not one of the orders in the Judicial review application.

In response, counsel for the respondents agreed that indeed the issue of property ownership was not part of the application for judicial review but that the issues of property ownership were introduced by the appellants in

their pleadings. That the appellants therefore prompted the trial judge to make pronouncements in respect of property.

A quick look at the trial Judge's orders in judicial review on this subject, the trial judge stated that "for the avoidance of doubt this court is aware of the construction of a modern market that is ongoing at the premises of the 1st applicant. Nothing in this ruling should be read to fetter the continued and uninterrupted construction of the market or legal ownership of stalls and shops in this market by those who have paid for them".

However, in her ruling and orders in consolidated Misc Application nos 894/2017 and 139/2018 she departed from her earlier position when she held as follows;

"In particular, the resolution directing that the vacant part of the suit land comprised in LRV 4256 Folio 8 Plot 9A1 Nakivubo be handed over to Capital Ventures."

I have earlier held that all meetings convened by the respondents were illegal and therefore not binding on the 1st appellant. The trial judge therefore erred by finding that the resolutions arising from such meetings were legal. Grounds 7 and 8 therefore succeed.

Ground 9:

The learned trial Judge erred in Law and in fact when she entertained Misc. Application nos.139/2017 and 894 /2018 and made orders that had an effect of altering the ruling and orders in Misc. Cause no.109 of 2017 when she was already functus officio.

The above grounds were already considered in ground 5. I also note that the respondent did not submit in response to grounds 9. It is therefore academic to consider these grounds since they have already been considered.

Before taking leave of this matter, the Court wishes to note that judicial review should always be remedy of last resort that should be invoked where there is no other available remedy. The **Judicature (Judicial Review) Rules 2009, under rule 5(1),** an application for Judicial Review should be brought in any event within 3 (three) months from the date when the grounds of the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.

It will be noted that the first decision of the Registrar, which the respondents challenged in their judicial review application in the lower Court, was made on 21st April 2015. It therefore follows that the respondent's judicial review application which was filed on 22nd July, 2015 which was beyond the prescribed time, was filed out of time. The respondents did not bother to apply for extension of time so as to file their belated application.

In conclusion, the appeal succeeds in part, in accordance with the analysis set out above. Accordingly, this Court makes the following orders:

1. The ruling and orders of the lower Court are set aside, and the Court substitutes, instead, an order dismissing the respondents' judicial review application in the trial Court.

2. Since, the appeal only partially succeeds, the Court grants to the appellants 4/5 of the costs of the appeal and in the Court below.

We so order.

Dated at Kampala this 13th day of May 2023.

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Elizabeth Musoke

Justice of Appeal

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Stephen Musota

Justice of Appeal

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Muzamiru Mutangula Kibeedi

Justice of Appeal